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No.

In the Supreme Court of the United States

October Term, 1982

HELEN B. O'BANNON et al.,
Petitioners

v.

JACK SHADIS et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Where a state provides funds for legal services for the poor through contracts with legal service programs, are provisions in those contracts by which the legal service programs agree not to request or accept attorneys' fees against the state or its employees invalid and unenforceable as violative of a public policy announced in a federal statute allowing an award of attorneys' fees in such cases, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988?

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit is as follows:

JACK SHADIS, BELLE FEINBERG, MARIE BURTON, Individually and on behalf of all other persons similarly situated,

Appellees

v.

FRANK BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania,

WILBUR E. HOBBS, Individually and as Deputy Secretary of the Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

LEO A. SULLIVAN, Individually and as Welfare Policy Specialist, Office of Basic Family Maintenance, Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

DON JOSE STOVALL, Individually and as Executive Director of the Philadelphia County Board of Assistance,

HELEN HYDE, Individually and as Director of Operations, Philadelphia County Board of Assistance,

JUNE REED, Individually and as District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

CYNTHIA ANDERSON, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

MILDRED DAVIS, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

and

AURELIUS ROBERTSON, Individually and as Casework Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

WILLIAM HARDEN, JOHN GRADY,

Appellants

Pursuant to Federal Rule of Civil Procedure 25(d), Helen B. O'Bannon, current Secretary of the Department of Public Welfare, is being substituted for her predecessor in office, Frank Beal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Helen B. O'Bannon, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, hereby petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered July 20, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit of which petitioners seek review is reproduced at 1a. The opinion and order of the district court is reproduced at 26a and is reported at 520 F. Supp. 858 (E.D. Pa. 1981).

II. JURISDICTION

The judgment of the Court of Appeals was entered July 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976:

In any action or proceeding to enforce a provision of §§1977, 1978, 1979, and 1981 of the Revised

Statutes (42 U.S.C. §§1981-1986), Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

P.L. 94-559, 90 Stat. 2641 (1976), 42 U.S.C. §1988.

IV. STATEMENT OF THE CASE

For each fiscal year from July 1, 1975 through June 30, 1981, the Commonwealth of Pennsylvania, through its Department of Public Welfare (DPW), contracted with a private non-profit corporation known as Pennsylvania Legal Services Center, Inc. (PLSC) for the provision of legal services to low income persons. In exchange for state funding, PLSC agreed to provide legal services both itself and through sub-contracts with local legal service programs (LSPs) throughout Pennsylvania. One of these LSPs was Community Legal Services, Inc. (CLS), a private non-profit corporation providing legal services to the poor in Philadelphia.

Under those contracts, PLSC received approximately $10 million per year of which between $2.3 to $3 million was paid annually to CLS. Approximately 25% of these moneys were state funds; approximately 75% were received by Pennsylvania from the federal government under Title XX of the Social Security Act, 42 U.S.C. §1397, *et seq.*[1]

The contracts outlined the services to be provided. Those services included representation of the poor in a

[1] Title XX authorized grants to the states for a variety of social services to be determined in the state's discretion. Pennsylvania was not obligated to use any of these funds for legal services. Title XX was amended by the Social Services Block Grant Act of 1981, P.L. 97-35, §2351, *et seq.* 95 Stat. 867 (1981) to give the states even greater discretion in the use of federal funds for social services.

wide variety of civil matters, including litigation against the state and state employees. The DPW-PLSC contracts also required PLSC's subcontracts to contain certain terms, including those at issue in this case prohibiting the receipt of attorneys' fees under limited circumstances.

Specifically, the DPW-PLSC and the PLSC-CLS contracts for the fiscal year from October 1, 1979 through June 30, 1980 contained the following clause:

> The LSPs and the Corporation shall not request attorneys fees in any case brought against the Commonwealth or Commonwealth employees. In the event that any such attorney fees are awarded to the Corporation or LSPs, DPW will deduct the amount of fees so awarded from payment on the next invoice submitted by the Corporation. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

The contracts for the fiscal year from July 1, 1980 through June 30, 1981 contained the following clause:

> The LSP may not accept attorneys fees in any cases brought against the Commonwealth or Commonwealth employees. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

The present case was commenced in November 1975 by CLS on behalf of a class of medical assistance recipients under the Civil Rights Act of 1871, 42 U.S.C. §1983. Plaintiffs claimed violation of federal constitutional and statutory rights.[2]

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[2] The substance of plaintiffs' claim was that the Secretary and other officials of DPW had violated plaintiffs' due process

After succeeding on the merits, CLS sought attorneys' fees relying on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. In response to CLS's request, defendants, all of whom were Commonwealth officials, contended that the anti-fee provisions of the 1979-80 and 1980-81 contracts prohibited CLS from requesting or accepting fees, and that no award could be made to it.

By opinion and order dated August 17, 1981, the District Court held that the relevant contract provisions were void because they conflicted with the public policy expressed in the Attorney's Fees Awards Act. The parties had agreed that if attorneys' fees were permitted, their reasonable amount was $85,000. Accordingly, judgment was entered in that amount.

The Court of Appeals for the Third Circuit, by opinion and order entered July 20, 1982, affirmed the District Court's invalidation of the contract clauses. In so doing, the Court of Appeals found that the Attorney's Fees Awards Act established a public policy in favor of attorneys' fees awards in civil rights actions. Applying Section 178 of the Restatement (Second) of Contracts, the Court balanced that policy against the various interests supporting enforcement of the waiver provisions in the funding contracts. It found that policies against enforcement of the waiver provisions outweighed policies in their favor and, therefore, affirmed.

It is from that decision of the Third Circuit that defendants, petitioners herein, seek certiorari.

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rights in terminating medical assistance benefits and in operating the medical assistance program at eligibility levels in conflict with the federal Social Security Act and federal regulations. The Court prescribed injunctive relief requiring the reinstatement of class members to the program, and revised eligibility levels. A claim for damages was ultimately settled.

V. REASONS FOR GRANTING THE WRIT

This Case Raises Important Issues of Whether the Right To Request and Receive Attorneys' Fees Under the Civil Rights Attorney's Fees Awards Act of 1976 Is Waivable by a Party and Discretionary With a Court, and, If So, Whether a Court May Ignore That Legislative Judgment by Voiding Contract Provisions Which Seek To Waive the Right

The courts below have either incorrectly given the Attorney's Fees Awards Act of 1976 excessive weight or have applied erroneous federal common-law standards to declare a contract term void as against public policy, or both. These courts have made a statute authorizing attorneys' fees a mandate that cannot be waived and have interfered with the state's ability to fund social service programs through contracts. Ironically, the decisions, if allowed to stand, will likely impair the very statutory purpose they sought to promote.

The traditional American rule has been that each party to a lawsuit must bear its own attorney's fees. *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975). The Civil Rights Attorney's Fees Awards Act of 1976 (hereafter "the Act") was Congress's response to *Alyeska;* it gave the courts authority to award fees in certain kinds of cases. It did not, however, require an award of fees in any case, nor even that fees be considered unless a prevailing party requested them. By its terms, it made an award discretionary and the courts have acted ac-

cordingly. *Gagne v. Maher*, 594 F.2d 336 (2nd Cir. 1979), *aff'd.* 448 U.S. 122 (1980) (award reduced because counsel received public funding); *Zarcone v. Perry*, 581 F.2d 1039 (2nd Cir. 1978), *cert. denied* 439 U.S. 1072 (1979) (award denied where funds were available for a fee from judgment on the merits); *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980) (award denied completely because amount requested was excessive); *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979) (award denied because funds were available for a fee from judgment on the merits). Last term this Court reaffirmed the discretionary nature of a fee award under the Act. *White v. New Hampshire Dept. of Employment Security*, U.S. , 102 S.Ct. 1162, 1167, 1168 (1982). The courts below failed to give sufficient consideration to this discretionary nature of the Act.

A contract under which a party gives up certain rights in return for a valuable consideration can be declared void on the basis of a policy expressed in a federal statute only when that statute requires the relinquished relief, that is, makes it unwaivable. In *Muschany v. United States*, 324 U.S. 49, 66 (1945), this Court said:

> As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.

In *D. H. Overmyer Co., Inc. v. Frick Company*, 405 U.S. 174 (1972), the Court held that even the constitutionally guaranteed rights to notice and hearing before a civil judgment were subject to contractual waiver.

Certainly, if basic constitutional rights can be waived by contract, there can be no general policy against the waiver of statutory rights and, as noted above, there is no

explicit prohibition of such a waiver in the Attorney's Fees Awards Act. To the contrary, since fees may clearly be waived implicitly by inaction—a failure to seek them—there is no statutory prohibition, either expressed or implied, against a more explicit waiver by contract in return for valuable consideration.

Both the District Court and the Court of Appeals purported to apply the Restatement (Second) of Contracts, Sec. 178. However, the Restatement, properly interpreted, could not result in invalidation of the contract provisions unless the Act was read as unwaivable and mandatory. The Restatement states:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations.
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of a particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions;
>
> (b) the likelihood that a refusal to enforce the term will further that policy;

(c) the seriousness of any misconduct involved and the extent to which it was deliberate; and

(d) the directness of the connection between that misconduct and the term.

This section recognizes that contracts are presumed valid and that the entire contract must be reviewed before declaring one term invalid.

Federal courts that have applied the Restatement to invalidate contract provisions have done so only after finding that the contractual terms were directly and expressly prohibited by statute. *Jackson Purchase v. Local Union 816*, 646 F.2d 264 (6th Cir. 1981); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977). Similarly, a state court applying the Restatement held that:

> Enforcement will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh 'the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the contested term.'

Maryland National Capitol Park and Planning Commission v. Washington National Arena, 282 Md. 588, 607, 386 A.2d 1216 (1978). There the court upheld a term in a lease of land for a sports arena which prohibited the lessee from appealing any determination that improvements to the land were taxable. The court noted the benefits obtained by the lessee and the public as a result of the lease taken as a whole. Thus, the Restatement itself upholds contract terms unless the statutory policy prohibits relinquishment of the statutory right, especially where substan-

tial public interests support the contract and where the party attempting to enforce it has performed its part of the bargain.

The interests in enforcement here were substantial when considered in light of Pennsylvania's program for funding of legal services. Pennsylvania had no legal obligation to fund legal services at all, let alone to fund them through PLSC or CLS, or in any particular way or in any particular amount. *See Harris v. McRae*, 448 U.S. 297, 312-318 (1980); *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). However, Pennsylvania determined that the provision of free legal services by the state to its low income citizens was in the best public interests, a determination that neither CLS nor the lower courts question.

Likewise, providing services through fixed sum funding contracts with legal service programs was in the public's best interest. With their funding known in advance, the legal service programs could hire staff, rent space, buy supplies, cover litigation expenses and develop a practice expert and efficient in the delivery of legal services to the poor. In fact, the contractual funds were paid, and these goals were accomplished. These results were consistent with the policies underlying the Attorney's Fees Awards Act, and were more likely to assure civil rights enforcement on behalf of the poor than the uncertain possibility of attorneys' fees awards.

The definition of funding was also in the public interest because it allowed the state to fully and rationally allocate its available social service funds. In this connection, part of the state's legitimate interest was protection from further uncertain financial liability to the agencies it had

already supported. The state also had a legitimate interest in avoiding time-consuming litigation over attorney's fees motions by attorneys on both sides of a case whose primary duty was representation of public interests.

Nothing in the record or in logic suggests that the state tried to "buy immunity" from suits by legal services attorneys, that CLS would not have sued the state unless it could recover attorneys' fees or that such a provision would have altered the identity of the defendants in actions brought by CLS clients. The contracts permitted, and, indeed, provided funding for suits against the state, and legal services to the poor must inevitably involve litigation arising out of the complex welfare programs administered by the State. Thus the state funded a program that would inevitably sue it; in exchange it asked only for an agreement that its financial contribution to this program be defined in advance.[8]

In light of the substantial interests supporting the contractual clauses prohibiting attorneys' fee requests, and the correct standards for invalidation of contracts on public policy grounds, the clauses should stand unless the federal statute or federal policy makes attorneys' fees both unwaivable and mandatory. Nothing in the Act suggests that a prevailing plaintiff must seek attorney's fees and cannot waive them, either implicitly, by inaction, or explicitly, by agreement. Moreover, despite legitimate policy interests supporting fee awards, even when sought, such awards are clearly discretionary. For the courts below to reach their results they had to either ascribe a mandatory, unwaivable

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[8] CLS has not claimed that the amount of attorneys' fees that it would have recovered but for the contracts exceeds the amounts received under them.

effect to the Act in contradiction of its express terms or apply erroneous standards for review of contracts that allowed them to override the legislative judgment that the Act had neither effect. To correct either of these errors this Court should issue a Writ of Certiorari to review this case.

CONCLUSION

The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review its judgment entered July 20, 1982.

Respectfully submitted,
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